

PRACTICES AND PROCEDURES IN  
JUDGE MONTALI'S COURT

(July 2015)

Judge Montali has established certain practices and procedures in his court. Counsel and litigants appearing before Judge Montali should be aware of the following:

***I. ORDERS AND JUDGMENTS***

***A. Obtaining an Order Shortening Time***

A party seeking an order shortening time must comply with B.L.R. 9006-1. The party must submit a declaration describing the efforts made to obtain the consent of the opposing party to the order shortening time. A request for an order shortening time should be made in writing. In general, Judge Montali will not require the opposing party to file any written response to a motion that is scheduled on shortened time, and opposition may be presented at the hearing.

Judge Montali does not require an order shortening time on a motion for interim authority to use cash collateral or to obtain credit. See FRBP 4001(b)(2) and (c)(2). To obtain a date and time for the initial hearing on a motion to use cash collateral or obtain credit, counsel should contact Ms. Lorena Parada, Courtroom Deputy/Calendar Clerk, at 415-268-2323 or Lorena\_Parada@canb.uscourts.gov.

***B. Procedures for Temporary Restraining Orders (TROs)***

Moving parties should give at least 72 hours' notice to, and service of moving papers upon, opposing parties. No order shortening time is necessary. A complaint must be filed prior to the hearing. To obtain a date and time for a hearing on a request for a TRO, counsel should contact Ms. Lorena Parada, Courtroom Deputy/Calendar Clerk, at 415-268-2323 or Lorena\_Parada@canb.uscourts.gov.

***C. Submission of Orders***

1. Uploaded orders should be converted to PDF electronically, not scanned.

2. Do not put "proposed" in the title of the order.

3. Unless the order indicates that opposing counsel has approved the form or substance, a proof of service of proposed orders in accordance with B.L.R. 9021-1 should be docketed separately before the order is uploaded, along with any declarations of default or other documents necessary for the review of an order. Notwithstanding B.L.R. 9021-1(b), orders not approved as to form may be signed sooner than seven days. Objections to the form of the order should be filed or transmitted by email to [montali\\_orders@canb.uscourts.gov](mailto:montali_orders@canb.uscourts.gov). as soon as possible.

4. Do not upload an order prior to a hearing. See B.L.R. 9021-1(a). Relief granted at the hearing may differ from the type sought, and there may be technical difficulties replacing the premature order with one that is consistent with the ruling.

5. Court Service List: B.L.R. 9022-1 requires that a party uploading an order provide a court service list identifying "contesting parties" upon whom the court should serve the order.

(a) No service list is required when the underlying motion requests generalized relief that does not identify a specific, identified respondent party (i.e., a debtor's motion to convert, a motion to amend a chapter 13 plan, a motion to employ, a motion to abandon, etc.) and no party has objected.

(b) A service list containing the names and addresses of identified respondents against whom specific relief is granted (i.e., a lienholder whose lien is being stripped; a claimant whose claim is being disallowed, etc.) is required even if the identified party has not responded. A court service list should contain the name of any party who has objected to the underlying motion, either in writing or at the hearing. HOWEVER, no service list is required if a respondent or objecting party is represented by counsel who is a registered CM/ECF participant in the case or proceeding.<sup>1</sup> **For all orders granting relief against an**

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<sup>1</sup>To view a list of Registered Participants in a particular case or adversary proceeding, go to UTILITIES in ECF; click on "Mailings . . . "; click on "Mailing Info for a Case No."; insert the case number; then click

individual debtor, the court service list should contain the name and address of the debtor, even if his or her counsel is a registered CM/ECF participant.

## **II. SPECIFIC MOTIONS AND ORDERS**

### **A. Avoiding a Judgment Lien that Impairs an Exemption**

Judge Montali requires a declaration from the debtor or some other appropriate offer of proof providing the following information: the value of the encumbered property, the amount and nature of the debtor's exemption, the extent of the impairment, and the amount of the judgment lien and all other liens encumbering the property (see 11 U.S.C. § 522(f)(2)(A)). The debtor should also disclose any other facts supporting his or her contention that 11 U.S.C. § 522(f)(1) is applicable.

The movant should ensure that service of the motion complies with FRBP 7004 and 9014(b). See *Beneficial Cal., Inc. v. Villar (In re Villar)*, 317 B.R. 88 (9th Cir. BAP 2004).

### **B. Valuing and Stripping Unsecured Liens on Real Property (Individual Chapter 11 and Chapter 13 Cases)**

In filing and serving an initial motion to value a lien and a subsequent motion to strip the lien upon completion of plan payments or discharge, debtors must comply with this court's *Guidelines for Valuing and Avoiding Liens in Individual Chapter 11 Cases and Chapter 13 Cases* (available on the court's website). Movants must comply with FRBP 7004(b) and (h).<sup>2</sup> At the time of discharge or completion of plan payments, debtors can move for an order voiding/stripping the previously valued lien. A motion to void the lien must be served on the affected lienholder in accordance with FRBP 7004(b) & (h) and contain the dates and docket numbers of the initial valuation motion and the order valuing the lien, the actual or anticipated date of the discharge

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SUBMIT. The list shall include counsel and/or parties who are currently registered participants and who will receive e-mail notice/service for the particular case or adversary proceeding.

<sup>2</sup>To determine whether a respondent is a federally insured depository (and to obtain service information for such a depository), go to <http://research.fdic.gov/bankfind/>. To determine appropriate addresses for other corporations or limited liability companies, go to the Business Search page at <http://kepler.sos.ca.gov/>.

or completion of plan payments, and a description of the lien being voided. The affected lienholder (whether or not a response is filed) should be placed on the court service list accompanying the order.

C. Motions to Extend Time to File Schedules and Other Required Documents in Cases Involving Individuals

Judge Montali will generally limit extensions to file documents required by 11 U.S.C. § 521(a) to thirty days after the petition date. Orders granting extensions to file documents should indicate that the case may be dismissed without further notice if the documents are not filed by the extended deadline or if the debtor does not obtain a further extension of time.

D. Loan Modification Orders

An order authorizing a loan modification should include the following language: "The Court's authorization to enter into the loan modification does not constitute court approval of the specific terms of the modification."

E. Default Judgments In Adversary Proceedings

Movants must submit a proof of service showing that the request was served on any non-responding defendant. Except in certain matters (e.g., trustee avoiding actions, 11 U.S.C. § 523(a)(2)(C) cases, and others as determined on a case-by-case basis), a plaintiff seeking a default judgment must schedule a "prove-up" hearing (see Fed. R. Civ. P. 55(b)(2) and FRBP 7055) and serve notice of the hearing on the defendant at least fourteen days prior to the hearing. Any witnesses for the plaintiff must appear personally; the defaulting defendant is entitled to cross-examine any witness but is not permitted to present its own evidence or witnesses. The court will consider declarations only if the defaulted defendant agrees.

F. Motions to Sell, Motions to Sell Free and Clear of Liens or to Assume/or Assign Executory Contracts or Leases

Motions to sell free and clear of liens or motions to assume or assign executory contracts or leases must comply with B.L.R. 6004-1 or 6006-1 and with this court's *Guidelines Re Sale Orders*, available on this court's website.

G. Sale Motions: Section 363(m) Good Faith Determinations

1. Burden of Proof; Discretionary Finding: Any bidder requesting a finding that its purchase of assets is in good faith under 11 U.S.C. § 363(m) has the burden to establish such good faith. This court has discretion to refuse to make such a finding, and the preclusive effect of such a finding may be limited. *In re Fitzgerald*, 428 B.R. 872 (9th Cir. BAP 2010).

2. Evidentiary Support: A bidder seeking a section 363(m) good faith determination must file a written declaration including disclosure of:

a. The bidder's prepetition and postpetition relationship with other bidders, the debtor, major creditors or equity security holders in the case, or any of the debtor's officers, directors, agents, attorneys or employees;

b. The bidder's expected relationship after the sale with the debtor's present or former officers, directors, agents, or employees (including whether any offers of employment or compensation have been made or will be offered to debtor's present or former officers, directors, agents, or employees);

c. Whether any consideration is contemplated to be transferred or has been transferred by bidder in connection with the sale to any person other than the debtor (or the trustee of the debtor's estate); and

d. The absence of fraud or collusion between the bidder and any other bidders or the debtor's officers, directors, agents or employees, or any attempt to take unfair advantage of other bidders.

For further guidance, see *In re M Capital Corp.*, 290 B.R. 743, 752 (9th Cir. BAP 2003). See also this court's *Guidelines Re Sale Orders* (available on the court's website).

H. Compromise/Settlement of Controversy

Motions for approval of compromises under FRBP 9019 must include a supporting declaration from someone with first-hand knowledge of the reasons for, and the terms of, the settlement. The filing of a notice alone is inadequate. The moving party should explain why the compromise is "fair and equitable" and "in the range of

reasonableness" and include a fact-specific analysis of the four factors set out in *In re A & C Properties*, 784 F.2d 1377, 1381 (9th Cir. 1986). In routine settlements, the factors can be described in a paragraph or two; more complex matters require a more detailed analysis. It is sufficient to provide creditors with a notice that succinctly summarizes what has been stated in the motion and supporting declaration. See FRBP 2002(a)(3).

If appropriate, counsel should ensure that any related adversary proceedings that have been settled are dismissed as soon possible.

#### I. First Day Motions

First day motions (i.e., motions to pay prepetition wages, pay critical vendors, borrow or use cash, etc.) must be accompanied by declarations of the facts asserted and setting forth adequate financial information to put the motion(s) in context. The moving party should provide sufficient financial information to enable Judge Montali to assess the impact of the requested relief on unsecured creditors.

Specifically, the declarations should include information about the value of a debtor's assets, and the extent to which they are encumbered; the amount of current and long term liabilities, with specific mention of debts entitled to priority under 11 U.S.C. § 507; the current cash situation; the amount of prepetition wages owed and to whom (by name and position/occupation with the debtor and amount owed); a budget for operations; the nature of the connections (if any) between the debtor and any party providing financing; and, if known, the chapter 11 exit strategy of the debtor (e.g., sale as a going concern, liquidation of assets, continuation of business with infusion of capital, etc.). See also the court's *Guidelines for Cash Collateral and Financing Stipulations*.

Counsel must be familiar with and to comply with FRBP 4001(b), (c) & (d), dealing with motions to use cash collateral, to obtain credit, and for approval of certain stipulations.

#### J. Employment of Estate Professionals

Judge Montali generally does not approve the following items frequently found in retainer/employment agreements unless the professional has convincingly justified them in the application itself:

1. Attorneys' or other liens for unpaid bills.
2. Late charges/interest.
3. Exculpation or limitation/waiver of liability.
4. Mandatory arbitration of fee disputes or malpractice claims.
5. Provisions that state payment is due upon invoicing.
6. Provisions that allow counsel to withdraw as counsel for debtors-in-possession without court approval.

Employment orders should reflect that fees and expenses are subject to court approval and any request for allowance and payment of such fees is subject to the court's Guidelines for Compensation and Expense Reimbursement of Professionals and Trustees. If the debtor is paying a post-petition retainer, the applicant should provide scream-or-die notice (See B.L.R. 9014-1(b)(3)) of the retainer to all creditors.

Judge Montali will normally not allow auctioneers to recover labor costs or to charge a buyers' premium. Any application to employ an auctioneer should reflect the auctioneer's agreement not to charge such costs and premiums, and the order should specify that no such premium is permitted.

Judge Montali will normally not allow real estate professionals representing the estate (as seller) to represent buyers. See 11 U.S.C. § 327(a) (trustee may employ "professional persons, that do not hold or represent an interest adverse to the estate"). Any application to employ a real estate professional should reflect the agreement of the professional that he or she will not represent the buyer and the order should likewise reflect the prohibition against dual agency.

### ***III. OTHER PRACTICES AND PROCEDURES***

#### ***A. Adversary Proceeding Status Conference Reports***

Judge Montali does not normally require status conference reports in adversary proceedings.

#### ***B. Calendaring Matters***

Judge Montali utilizes "open calendar" procedures. The Open Calendar Dates and Procedure for San Francisco cases and the Open Calendar Dates and Procedure for San Jose cases are available on

the court's website. *See, Part IV, San Jose Cases.*

For questions about the open calendar procedures, contact Ms. Lorena Parada, Courtroom Deputy/Calendar Clerk at 415-268-2323 or Lorena\_Parada@canb.uscourts.gov.

#### C. Telephonic Appearances

Counsel may appear telephonically on most matters. The San Francisco Division's "Procedures For Appearances By Telephone" is available on the court's website. They also apply to San Jose cases assigned to Judge Montali.

Telephonic appearances are arranged through CourtCall. All parties/counsel using this service must have an account or make arrangements to set one up well in advance of the hearing. To make a reservation to appear telephonically, a participant should call 1-866-582-6878 no later than 4:00 p.m. PT the day before the appearance. The coordinator will need the hearing date and time; the name of judge; the case name and number; the name and phone number of the attorney appearing; and verification that a CourtCall account has been set up.

After scheduling a reservation with CourtCall, attorneys will receive a confirmation, either by fax or e-mail, providing the party with dial-in information and telephonic instructions. Attorneys are required to notify CourtCall of any appearance substitutions.

Telephonic appearances are connected directly with the courtroom's public address system and electronic recording equipment so that a normal record is produced. To ensure a quality record, the court prohibits the use of car phones, cellular phones, public telephone booths, or phones in other public places except in emergencies or unless the presiding judge has consented. Participants should be able to hear all parties without difficulty or echo.

#### D. Communications With Chambers' Staff

FRBP 9003(a) prohibits ex parte communications with the court concerning matters affecting a particular case or proceeding. Rule 5-300(C) of the California Rules of Professional Conduct specifies that for disciplinary purposes, a contact with a judge's law clerk constitutes a contact with the judge. No attorney or party may initiate contact with the judge or his law clerk in violation of these rules.



Improper ex parte communications may include letters or e-mails to the court (especially where copies have not been provided to opposing parties and the United States Trustee) and telephone calls to the court. Individual cases may not be discussed with Judge Montali's law clerk or judicial assistant except to inform the court that an ex parte request or a form of order is opposed, that an emergency pleading or request for order shortening time is being submitted, that a chapter 11 plan proponent intends to go forward with a disclosure statement or confirmation hearing, or that a calendared matter has been settled or is being re-scheduled. (In the event of a settlement or re-scheduling, counsel should also contact Ms. Lorena Parada, Courtroom Deputy/Calendar Clerk, at 415-268-2323 or Lorena\_Parada@canb.uscourts.gov.)

To check on the status of an order, counsel should check CM/ECF or PACER. If the proposed order has not been entered on the docket after ten days, counsel may contact chambers by e-mail (Montali\_Orders@canb.uscourts.gov).

Occasionally counsel desire expedited handling of orders in the case of bona fide emergencies (e.g., sale of property; issuance of a temporary restraining order). After such an order has been uploaded into the ECF system, counsel may notify chambers via e-mail (Montali\_Orders@canb.uscourts.gov), with "URGENT ORDER" in the subject line. Do not send the order itself to the e-mail address.

When counsel needs to advise the court about a matter pertaining to a submitted order (e.g., that opposing counsel has agreed to the form; that opposing counsel has disagreed as to the form and will submit an alternate form, etc.), they may notify chambers at Montali\_Orders@canb.uscourts.gov, with a copy to opposing counsel and other parties as appropriate. Alternatively, counsel may docket (as a separate document) a letter with proof of service in CM/ECF (Bankruptcy/Miscellaneous/Document: include in the text "Letter to Court regarding proposed order"). A letter so docketed will become and remain a permanent part of the record in the case. Please notify chambers by e-mail (Montali\_Orders@canb.uscourts.gov) when the letter is docketed.

#### E. Obtaining Continuances and Extensions of Time

**Trials:** Judge Montali will grant continuances of trials for good cause only, even when the parties stipulate to a continuance. A request for continuance must be made by noticed motion or by a written stipulation stating the reason for the requested

continuance and an order should be uploaded. Parties requesting a continuance of a trial should comply with B.L.R. 9006-1.

**Motions:** If parties agree to continue a scheduled hearing on a motion, they merely need to contact Ms. Lorena Parada (415-268-2323 or Lorena\_Parada@canb.uscourts.gov) to inform her of the new date and time (available on the Open Calendar). No written stipulation is necessary. A party requesting a continuance that is opposed should comply with B.L.R. 9006-1.

**Extensions of Time:** In general, parties requesting extension of time to file a pleading or document should comply with FRBP 9006(b)(1) and B.L.R. 9006-1. Parties should be cognizant, however, that subsections (b)(2) and (b)(3) of FRBP 9006 either prohibit certain extensions (i.e., for filing a motion for new trial or to amend a judgment under FRBP 9023) or severely limit the conditions in which an extension can be granted (i.e., for filing a proof of claim in a chapter 7, 12 or 13 case under FRBP 3002(c)).

#### F. Discovery Disputes

Judge Montali will generally hold a telephonic conference to resolve a discovery dispute in lieu of formal motions to compel or quash discovery. (See B.L.R. 1001-2(a)(46) and Civil L.R. 37-1(a) and (b)). Parties should comply with the procedures set forth in Civ. L.R. 37-1. To schedule a telephonic conference regarding a discovery dispute, counsel should contact Ms. Lorena Parada, Courtroom Deputy/Calendar Clerk, at 415-268-2323 or Lorena\_Parada@canb.uscourts.gov. The counsel requesting the telephone conference should send a brief e-mail describing the dispute to Ms. Parada, with a copy to opposing counsel; opposing counsel may e-mail a brief response.

Any request for sanctions relating to a discovery dispute must be made by separate noticed motion.

#### G. Motions To Seal Documents or to Redact Information

A party wishing to file a document under seal should follow Civ. L.R. 79-5 (incorporated by B.L.R. 1001-2) and the procedures on the court's website. See FRBP 9018. Parties opposing such a request should respond as soon as possible, since the court will normally act on any such matter promptly and without a hearing. If party seeks to seal or redact an unredacted document that has already been placed on the public docket, it should comply with the Interim District Procedure for Motions to Redact (dated

February 27, 2015), available on the court's website.

#### H. Fee Applications

**Chapter 13 Cases:** Even though Guideline #7 of the Guidelines for Compensation and Expense Reimbursement of Professionals and Trustees for the United States Bankruptcy Court for the Northern District of California does not specifically apply to fee applications in chapter 13 cases, Judge Montali does require counsel in chapter 13 cases to provide their clients with the letter described in that Guideline.

**Chapter 7 Cases:** If there are no timely objections on file either to the final account or fee request of a chapter 7 trustee or the fee applications of any of the trustee's professionals, there is no need for the trustees or the professionals to appear at the scheduled hearings as long as they are available by telephone at the scheduled time of the hearing. For pending objections, the party whose account, request or application is the subject of the objection should appear. Absent objections, if someone appears at the hearing or the court has questions, the courtroom deputy will call the trustee or the particular professional in the course of the hearing or request an appearance in advance.

#### I. Fees Generally

**Travel:** Judge Montali generally will allow up to two hours of compensation for non-working airplane travel time, to account for inevitable delays for security and administration involved in air travel. Other air travel time is not likely to be compensable, as set forth in Guideline 17 of the Guidelines for Compensation and Expense Reimbursement of Professionals and Trustees.

**Conflicts Checks / Ethical Walls / Change of Firms:** Judge Montali expects counsel to write off, and will normally disallow, time spent identifying, clearing and avoiding conflicts and complying with FRBP 2014(a). Such time is similar to a firm absorbing the time expended on its own efforts to secure a new client, which Judge Montali doubts any professional would bill. He also expects counsel to write off, and normally will disallow, time spent by professionals who change offices or firms, and need to clear conflicts, set up new files, brief new attorneys, or perform other tasks in connection with the transition.

**Retainers:** Judge Montali does not require retainers to be held in a trust account, unless there is an agreement between the attorney and the client requiring such segregation.

J. Disclosure Statement Hearings

As set forth in his Order Establishing Procedures for Disclosure Statement Hearing and Confirmation Hearing ("DS Order"), which is available on the court's website, Judge Montali has different procedures depending on whether the proponent is seeking conditional approval or final approval of a disclosure statement. For most chapter 11 cases involving individuals or small businesses (as defined in 11 U.S.C. § 101(51)(C) and 51(D)), Section B of the DS Order provides abbreviated procedures for hearings in which the plan proponent seeks tentative approval of a disclosure statement and has utilized either the court's Standard-Form Combined Plan and Disclosure Statement or the national form of a small business plan and disclosure statement (Official Form Nos. 25A and 25B) (in either case, the "Form DS/Plan"). The Form DS/Plan are available on the court's website.

Section C of the DS Order sets forth procedures for hearings in more complex chapter 11 cases in which the plan proponent is seeking final approval of a separate disclosure statement in accordance with FRBP 3017. In such cases, strict compliance with B.L.R. 2017-1 is expected. In particular, a competent witness for the plan proponent must be present at the hearing.

In either case, counsel for the proponent must notify the judge's law clerk by e-mail (Peggy\_Brister@canb.uscourts.gov) at least three business days prior to the hearing that the hearing will go forward. The court may refuse to proceed with the hearing if this call is not made.

Hearings on Plans and Disclosure Statements are not available via the Open Calendar and must be set by contacting the Calendar Clerk.

K. Stipulations for Relief from Stay

Generally, Judge Montali will not approve a stipulation for relief from stay that purports to be effective in any subsequent case filed by the debtor. Judge Montali will approve provisions that grant relief from the stay on ten days' notice to debtor and debtor's counsel if the debtor defaults on agreed payments under the order before debtor becomes post-petition current. If, however, the debtor defaults after becoming post-petition

current, the movant must re-set the motion on ten days' notice.

L. Compliance With Local Rules

Counsel and parties should comply with all local rules. In particular, in order to avoid delays in the processing of orders, parties should comply with B.L.R. 9014-1(b)(4) (when requesting entry of order by default) and B.L.R. 9021-1 (when relief is sought against a particular person or entity that has not stipulated to the relief).

M. Conflicts Checks

Judge Montali does not expect counsel to run every creditor and party in interest through a conflicts check. He does expect counsel to use professional judgment in determining the scope of an appropriate conflicts check. At a minimum Judge Montali believes that counsel should include in their conflicts check any party who has a major interest in the case (e.g., major unsecured creditors, secured creditors, major equity security holders / owners, officers and directors, landlords / lessors, and other professionals retained in the case). Counsel should disclose potential conflicts with any such party, including anticipated future conflicts.

#### **IV. *SAN JOSE CASES***

As of July 1, 2015, certain Chapter 7 and Chapter 11 cases, and related adversary proceedings, have been or will be assigned to Judge Montali. These Practice and Procedures will apply in San Jose as well as San Francisco. Judge Montali's San Jose Open Calendar Dates and Procedure is posted on the court's website.

For San Jose, the following procedures will also apply:

A. Courtroom Deputy

Ms. Lorena Parada, Courtroom Deputy/Calendar Clerk, 415-268-2323, Lorena\_Parada@canb.uscourts.gov, will handle all San Jose calendar matters.

B. Chambers Copies

See Judge Montali's preference for copies on the court's website. Copies should not be presented or mailed to the clerk in San Jose. They should be mailed to:

Dennis Montali - "Chambers Copies"  
U.S. Bankruptcy Judge  
P.O. Box 7341  
San Francisco, CA 94120

C. Hearings in San Francisco by Video or Teleconferencing

Some San Jose case matters will be heard in San Francisco on an emergency basis or when more convenient for counsel. If a San Francisco hearing is mutually convenient, it may be scheduled via the San Francisco Open Calendar Procedure. San Francisco cases may not be set on the San Jose calendar without prior court approval.

Some hearings in San Jose may need to be conducted by telephone or video. Counsel will be notified in advance when that is necessary.